No. 84-782

In the Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF SOUTH CAROLINA, ET AL., PETITIONERS

v.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

JACQUES B. GELIN
ARTHUR E. GOWRAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the enactment in 1959 of the Catawba Indian Tribe Division of Assets Act (Catawba Act), 25 U.S.C. 931 *et seq.*, ratified the 1840 conveyance by the Tribe to the State of South Carolina of the Tribe's interest in the 144,000-acre tract at issue or extinguished the Tribe's claim that that transaction violated the restraint on alienation in the Trade and Intercourse Act.

2. Whether Section 5 of the Catawba Act — which provides that upon revocation of the Tribe's constitution, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to the Tribe and its members and the laws of the several States shall apply to them in the same manner as they apply to other persons —made the South Carolina statute of limitations and law of adverse possession applicable to the respondent Tribe's claim when the Tribe's constitution was revoked on July 1, 1962.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATUTORY AND TREATY PROVISIONS INVOLVED

Section 5 of the Catawba Indian Tribe Division of Assets Act, 25 U.S.C. 935, and the pertinent provision of the Treaty of Augusta of 1763 between Great Britain and various Indian Tribes are reproduced as an appendix to this brief.

STATEMENT

1. a. The aboriginal home of the Catawba Indian Tribe consisted of parts of what are now the States of North and South Carolina.[1] In 1760, the Tribe and the Superintendent of Indian

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[1]The district court granted summary judgment for petitioners on the basis of undisputed facts and allegations in the respondent Tribe's complaint that it assumed to be true (Pet. App. 4a, 6a-7a). The historical background of the case set forth in the text is drawn primarily from the district court's and court of appeals' recitation of those facts and allegations (*id.* at 7a-10a, 41a-47a).

Affairs for Great Britain entered into the 1760 Treaty of Pine Tree Hill, under which the Tribe relinquished its aboriginal territory in exchange for a 144,000-acre tract of land (Pet. App. 6a-7a).[2] In 1763, representatives of the British Crown and the Catawbas and other Indians in the Southeast entered into the Treaty of Augusta, under which the Tribe again agreed to settle on a 144,000-acre tract in South Carolina. App., *infra,* 1a. The United States did not subsequently enter into a treaty with the Catawbas. Pet. App. 7a, 42a; C.A. App. 134-138, 256, 485, 502, 515; H.R. Rep. 910, 86th Cong., 1st Sess. 3 (1959). See C. Hudson, *The Catawba Nation* 50-51 (1970).

By the 1830's, almost all of the 144,000 acres referred to in the Treaty of Augusta had been leased by the Tribe to non-Indians pursuant to state statutes (C.A. App. 250). In 1840, the Tribe and South Carolina entered into the Treaty of Nation Ford (*id.* at 258). Under that Treaty, the Tribe relinquished the 144,000 acres to the State, and South Carolina agreed to spend $5,000 to acquire a new reservation for the Tribe, to pay $2,500 upon the Tribe's removal from its former lands, and to make nine annual payments to the Tribe in the amount of $1,500. In 1842, the State purchased approximately 630 acres for $2,000 as a new reservation for the Tribe. This 630-acre tract is still held in trust by South Carolina for the Tribe. Pet. App. 7a-8a, 43a; C.A. App. 152-156; C. Hudson, *supra*, at 64-65, 86-87.

b. In 1943, the Office of Indian Affairs of the Department of the Interior, the State of South Carolina, and the Tribe entered into a Memorandum of Understanding (C.A. App. 309-313). In accordance with this agreement, South Carolina purchased 3,434 acres of land and conveyed it to the United States to be held in trust for the Tribe. The federal Office of Indian Affairs agreed to make annual contributions of available sums for the welfare of the Tribe and to assist the Tribe with educational and medical

[2]The parties were unable to furnish the court with any documents containing the terms of the 1760 Treaty of Pine Tree Hill, but the court assumed for purposes of its decision that the Treaty existed and granted the Catawbas some interest in the land in issue (Pet. App. 42a; see C.A. App. 150). See D. Brown, *The Catawba Indian* 239-245 (1966); H.R. Rep. 2503, 82d Cong., 2d Sess. 263 (1952).

benefits. The Tribe, in turn, agreed to organize and to conduct its affairs on the basis of the federal government's recommendations, and it subsequently did organize under the Indian Reorganization Act, 25 U.S.C. 461 *et seq.* Pet. App. 8a-9a, 43a; C.A. App. 488.[3]

c. In September 1954, in accordance with Congress's then-current termination policy, a House Study Subcommittee on Indian Affairs reported that the Catawba Tribe was among various groups able to take responsibility for their affairs and therefore was ready for termination of federal services. H.R. Rep. 2680, 83d Cong., 2d Sess. 2-3 (1954).[4] The Tribe also desired an end to federal restrictions on alienation of its lands in order to facilitate financing for homes, farming, and improvements. Accordingly, a tribal resolution adopted on January 3, 1959, recommended the enactment of legislation "to accomplish the removal of Federal restrictions against the alienation of Catawba land" and to distribute tribal assets. However, the resolution expressed the desire that "nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe" (C.A. App. 337).

[3]The final 1943 Memorandum of Understanding omitted a provision in an earlier draft that would have required the Catawbas " 'to execute, in favor of the State of South Carolina, a release and quitclaim of all claims and actions, of whatsoever nature against the State of South Carolina' " (C.A. App. 306). The Solicitor of the Interior Department commented that "[t]his elimination is most desirable in that it avoids a procedure of doubtful legality which would have consisted in using a contract under the Johnson-O'Malley Act in order to deprive the Indian tribe of claims which it might be able to enforce in the courts" (*ibid.*).

[4]Witnesses testifying at the 1959 hearings on the termination bill for the Catawbas (see page 4, *infra*) stated that the Catawbas had been able to merge into the general community and had been able to attain an economic position comparable to that of non-Indians. Most adult male Catawbas were employed at the time: 47% were in industry, 20% in skilled labor, 7% in the armed services, 15% in odd jobs, 5% retired, and 6% on the welfare rolls. See generally *Division of Tribal Assets of Catawba Indian Tribe: Hearings on H.R. 6128 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 86th Cong., 1st Sess. 8, 22, 26-27, 100-101 (1959) (unpublished) [hereinafter cited as *Hearings*]. See also C.A. App. 477-478, 482, 493.

After Congress was assured that the Tribe desired termination (see *Hearings, supra* note 4, at 9, 18, 84-85; C.A. App. 337, 483-484, 501-507), it enacted the Catawba Indian Tribe Division of Assets Act (Catawba Act), 25 U.S.C. 931 *et seq.*, in 1959. On July 1, 1960, the Secretary of the Interior published a notice stating that a majority of the Tribe's members agreed to a division of the tribal assets in accordance with the Catawba Act (25 Fed. Reg. 6305), and on July 1, 1962, the Secretary revoked the Tribe's constitution as required by Section 5 of the Catawba Act, 25 U.S.C. 935 (App., *infra*, 1a). Thereafter, the 3,434-acre reservation that had been acquired for the Tribe pursuant to the 1943 Memorandum of Understanding was distributed among the members of the Tribe in accordance with Section 3 of the Catawba Act, 25 U.S.C. 933. Pet. App. 9a-10a, 46a.

2. On October 28, 1980, this suit was filed in the United States District Court for the District of South Carolina by respondent Catawba Indian Tribe, a non-profit organization incorporated under South Carolina law in 1975. The Tribe sought possession of the 144,000 acres that had been conveyed to the State in 1840 and trespass damages for the period of the Tribe's dispossession. Named as defendants, petitioners herein, were the State of South Carolina and approximately 90 other defendants, who also were sued as representatives of a class that was alleged to consist of approximately 27,000 persons who claimed an interest in the land. The Tribe alleged that the 144,000-acre tract was reserved to it by the 1760 Treaty of Pine Tree Hill and the Treaty of Augusta of 1763; that it came within the scope of federal restrictions against alienation upon the adoption of the Constitution and Section 4 of the Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 138; and that the 1840 conveyance of the Tribe's interest in the land to the State was void because it was not approved by the United States. Pet. App. 10a, 36a.

The district court granted summary judgment for petitioners on a number of grounds. First, the court held that Section 5 of the Catawba Act made the 10-year state statute of limitations under S.C. Code Ann. § 15-3-340 (Law. Co-op. 1977) applicable to the Tribe's claim as of July 1, 1962, and that this suit, which was filed in 1980, is time-barred under that provision (Pet. App. 47a-50a). Second, the court held that the Catawba Act precludes

respondent as a matter of law from establishing that it currently is an Indian tribe within the meaning of the Trade and Intercourse Act because the Catawba Act terminated the Tribe's existence as a governmental entity (Pet. App. 51a). Third, the court held that respondent could not establish the continued existence of a trust relationship between it and the United States because the Catawba Act terminated that relationship (*id.* at 52a). Fourth, the court held that the Catawba Act ratified the 1840 transaction between the Tribe and the State (*id.* at 51a-52a).

3. a. A divided panel of the court of appeals reversed and remanded for further proceedings (Pet. App. 4a-28a). Although the House and Senate Reports reflected Congress's awareness of the 1840 transaction, the court of appeals found no indication that Congress desired to extinguish tribal claims against South Carolina arising out of that transaction (*id.* at 13a-16a). The court also concluded that the revocation of the Tribe's constitution "did not terminate the Tribe" (*id.* at 17a), which "continued as a body of Indians, united in a community under one leadership, and inhabiting a particular territory" (*id.* at 18a).

For like reasons, the court of appeals held that Section 5 of the Catawba Act did not end the trust relationship that was established by the Trade and Intercourse Act with respect to the 144,000-acre tract (Pet. App. 18a-22a). The court believed that the language in Section 5 which provides that "all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them" made federal statutes inapplicable only to individual Indians, not to the Tribe. Insofar as the Tribe is concerned, the court concluded that the Act terminated only federal supervision under the 1943 Memorandum of Understanding, not the trust relationship arising under the Trade and Intercourse Act (Pet. App. 21a-22a). The court of appeals also rejected petitioners' contention that this suit is subject to the state statute of limitations by virtue of the provisions of Section 5 of the Catawba Act that remove the protections of federal law and make state law applicable to the Catawbas (Pet. App. 22a-23a).

b. Judge Hall dissented (Pet. App. 24a-28a). He was of the view that the Catawba Act "unquestionably terminated the Tribe's legal existence, ended any trust relationship between the

Catawbas and the federal government, and made South Carolina law fully applicable to whatever claim [respondent] may have had to the Tribe's ancestral land" (*id.* at 24a).

c. On rehearing, the en banc court reversed the judgment of the district court for the reasons given by the panel and remanded for further proceedings (Pet. App. 1a-3a). Judge Murnaghan filed a concurring opinion in which he expressed concern for innocent landowners and suggested that equitable considerations might preclude relief against them and instead point to a monetary remedy against South Carolina or the United States (*id.* at 30a-34a). Judges Widener, Hall and Phillips dissented for the reasons stated in Judge Hall's opinion dissenting from the panel's decision (*id.* at 3a).

DISCUSSION

Section 5 of the Catawba Act provides that, after the Tribe's constitution is revoked, federal statutes that affect Indians because of their status as such shall be inapplicable to the Tribe and its members and state laws shall apply to them in the same manner as they apply to all other persons in the State. Contrary to the court of appeals' conclusion, these provisions of Section 5 plainly made the South Carolina statute of limitations applicable to the Tribe's claim as of July 1, 1962, when the Tribe's constitution was revoked. Although this case is in an interlocutory posture and the issues presented directly affect only the claim of the Catawba Tribe, in our view the court of appeals' error is sufficiently clear and the impact of that error on the 27,000 potential defendants is sufficiently immediate that the Court should grant review.

1. Before addressing the statute of limitations issue, it is appropriate to consider whether the Catawba Act itself ratified the 1840 transaction between the Tribe and South Carolina or otherwise extinguished the Tribe's claim to the land covered by that transaction. We conclude that it did not, and, as to this issue, we agree with the court of appeals.[5] Although the Catawba Act

[5]Petitioners challenge this holding by the court of appeals only in passing (Pet. i (Question 3), 21-22). Petitioners cite (Pet. 21 & n.49) provisions in other termination acts for the proposition that Congress knew how to preserve federal claims when it desired to do so. See 25 U.S.C. 677r, 706 and 976. However, each of these provisions preserved tribal claims that previously had been filed against the *United States*, presumably under the Indian Claims Commission Act, which otherwise might have been thought to be eliminated by Congress's termination of the trust relationship between the United States and the tribe. The omission of any similar provision in the Catawba Act presumably is due to the fact that the Catawbas did not have an action pending against the United States under the Indian Claims Commission Act. See S. Rep. 863, 86th Cong., 1st Sess. 3 (1959).

itself makes no mention of the 1840 transaction, the district court relied on the fact that the House Report refers to that transaction[6] and that Section 2 of the Catawba Act, 25 U.S.C. 932, refers to the "assets" held in trust for the Tribe by South Carolina, which assets consist of the 630 acres that were purchased as a result of that transaction. The district court believed that this treatment of the assets in the Catawba Act constituted an "implicit ratification" of the 1840 transaction (Pet. App. 51a-52a). Especially in light of this Court's recent decision in *County of Oneida* v. *Oneida Indian Nation* (*Oneida II*), No. 83-1065 (Mar. 4, 1985), the district court's conclusion was erroneous.

In *Onedia II*, the Court reiterated the established rule that "congressional intent to extinguish Indian title must be 'plain and unambiguous' * * * and will not be 'lightly implied,' " in light of "the strong policy of the United States 'from the beginning to respect the Indian right of occupancy' " (slip op. 20, quoting *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339, 345, 346, 354 (1941)). In the Court's view, the mere reference to the Oneidas' 1795 transaction in the 1798 and 1802 Treaties ratified by the Senate "far from demonstrate[d] a plain and unambiguous intent to extinguish Indian title," since there was "no indication that

[6]See H.R. Rep. 910, 86th Cong., 1st Sess. 2 (1959):

> The Catawba Indians' relations with the Federal Government date back only to the 1940's. Their original reservation was set aside for them by treaty with South Carolina in 1763. In 1840 they agreed to cede this reservation to the State except for a single square mile of land which is still held in trust for them by the State. In return the State agreed to furnish certain essential services for them.

The Senate Report repeats this language verbatim. See S. Rep. 863, 86th Cong., 1st Sess. 1 (1959).

either the Senate or the President intended by these references to ratify the 1795 conveyance" (slip op. 20). It follows *a fortiori* that no ratification and extinguishment occurred here. There is not even any mention of the prior transaction in the text of the Catawba Act, as there was in the text of the treaties ratified by the Senate in *Oneida II*. Nor do the passages in the committee reports suggest an affirmative intent by Congress to ratify the 1840 transaction; they appear to be nothing more than recitations of historical fact.[7]

2. Although the Catawba Act did not in itself ratify the 1840 transaction as a matter of *federal* law, that Act did have the effect of subjecting the Tribe's claim to the operation of *state* law, including the 10-year statute of limitations (S.C. Code. Ann. § 15-3-340 (Law. Co-op. 1977)), beginning on July 1, 1962, when the Tribe's constitution was revoked.[8] In *Oneida II*, the Court

[7]Moreover, the Catawba Act should be construed in light of the resolution adopted by the Catawbas on January 3, 1959, expressing the desire that "nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe" (C.A. App. 337). This language admittedly might be read to refer only to a claim against the State alone, under state law, for a breach of the 1840 agreement, resulting from the State's failure to find another home for the Catawbas and to make the promised appropriation of funds. However, in light of the Tribe's prior assertions that the 1840 transaction violated the Trade and Intercourse Act (C.A. App. 185-187) and the canon of construction that ambiguous expressions are to be construed in the Indians' favor (see, *e.g.*, *Oneida II*, slip op. 19), the quoted passage in the resolution might also be read to reflect a desire to preserve a claim based on federal as well as state law, if that were necessary to vindicate the Tribe's interests. Because the Catawba Act was drafted to carry out the intent of the resolution (C.A. App. 338, 502; 105 Cong. Rec. 5162 (1959) (remarks of Rep. Hemphill); *Hearings, supra* note 4, at 8-10 (remarks of Rep. Hemphill)), this ambiguity in the resolution further cautions against reading the Catawba Act itself as a bar to this suit.

[8]The court of appeals also reversed the district court's holding (Pet. App. 51a) that the Catawba Act precludes the Tribe as a matter of law from establishing that it is an "Indian tribe" for purposes of the Trade and Intercourse Act and therefore precludes it from bringing a suit under that Act (see Pet. App. 17a-18a). Whatever the proper resolution of this issue as a general matter, we believe respondent has the capacity to bring the instant suit. The fact that Congress directed the Secretary to

reaffirmed the established rule that under the Supremacy Clause, state-law time bars do not apply of their own force to Indian claims to recover land that allegedly was conveyed in violation of restraints on alienation under federal law. Slip op. 13 n.13. But in Section 5 of the Catawba Act, Congress rendered that general rule inapplicable to the Catawbas.

a. Section 5 provides that after revocation of the Tribe's constitution, "the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction." The last clause expressly provides that state laws shall apply to "them" — *i.e.*, to the "tribe and its members" referred to in the first clause. The Court has described this language as expressing a congressional intent to subject the Indians affected to the "full sweep" and "full range" of state laws. *Bryan* v. *Itasca County*, 426 U.S. 373, 389-390 (1976). It is consistent with that interpretation to read the third clause to trigger the application of the state statute of limitations to any interests in land claimed by the Tribe and its members.

The second clause just quoted also has the effect of making state law applicable, because it frees any land claimed by the Tribe from the protective umbrella of federal law, including the

revoke the Tribe's constitution and provided that the Tribe would retain no special status under federal law did not mean that respondent, as its successor-in-interest, could not thereafter hold or seek to recover whatever property interests the Tribe owned prior to enactment of the Catawba Act and revocation of the tribal constitution. Compare *Menominee Tribe* v. *United States*, 391 U.S. 404, 409-413 & n.10 (1968). As the court of appeals pointed out (Pet. App. 18a), the State of South Carolina continues to hold 630 acres in trust for the Tribe. Moreover, the Catawba Act provides that certain of the lands held in trust by the United States in 1959 could be retained for tribal purposes (§ 3(b), 25 U.S.C. 933(b)), and the Catawba Act expressly does not affect the rights of the "tribe" under South Carolina law (§ 6, 25 U.S.C. 936).

restraint on alienation in the Trade and Intercourse Act.[9] Because the Tribe was free after 1962 to sell whatever interest it had in the land at issue in this case,[10] the Tribe likewise was obligated to assert its title within the time specified by the state statute of limitations and became subject to losing that title altogether by operation of state rules of adverse possession. See, *e.g.*, *Schrimpscher* v. *Stockton*, 183 U.S. 290, 295-297 (1902); *United States* v. *Waller*, 243 U.S. 452, 463-464 (1917); *Dillon* v. *Antler Land Co.*, 341 F. Supp. 734, 740-741 (D. Mont. 1972), aff'd, 507 F.2d 940, 942, 944 (9th Cir. 1974), cert. denied, 421 U.S. 992 (1975); *Dennison* v. *Topeka Chambers Industrial Development Corp.*, 527 F. Supp. 611, 623 (D. Kan. 1981), aff'd, 724 F.2d 869 (10th Cir. 1984). See also *United States* v. *Schwarz*, 460 F.2d 1365, 1371-1372 (7th Cir. 1972).

To be sure, even after 1962, the Tribe's asserted interest in the 144,000-acre tract continued to *derive* from federal law, by virtue of the established policy of the United States after adoption of the Constitution to respect Indian occupancy. *Oneida II*, slip op. 7-8; *Oneida Indian Nation* v. *County of Oneida* (*Oneida I*), 414 U.S. 661, 666-672 (1974). But that fact alone does not immunize an Indian tribe from state limitations law with respect to a claim to regain possession — anymore than it does grantees or patentees from the United States. See *Oneida I*, 414 U.S. at 676. See, *e.g.*, *Larkin* v. *Paugh*, 276 U.S. 431, 439 (1928); *United States* v. *Waller*, 243 U.S. at 463-464; *Dickson* v. *Luck Land Co.*, 242

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[9]The Trade and Intercourse Act clearly is a "statute[] of the United States that affect[s] Indians because of their status as Indians * * *." § 5, 25 U.S.C. 935. Congress's lifting of that Act also necessarily rendered inapplicable the common law restraint on alienation that the Act simply codified. See *Oneida II*, slip op. 6-8, 12.

[10]This freedom to alienate of course did not apply to the Tribe's 3,434-acre reservation that had been purchased by South Carolina and conveyed to the United States to be held in trust for the Tribe. See page 2, *supra*. Because the United States held legal title to those lands, the Tribe obviously could not sell them. Accordingly, Section 3 of the Catawba Act, 25 U.S.C. 933, provided for the Secretary to distribute those assets to tribal members. However, the United States never held the remainder of the 144,000-acre tract in trust for the Tribe, and it therefore would not have been necessary for the Secretary to participate in the sale of that land.

U.S. 371, 375 (1917). What uniquely immunizes the title of Indian tribes from state-law rules is the fact that, absent termination of the special relationship, the continuing tribal right to occupy the land remains protected by federal law. See *Oneida I*, 414 U.S. at 677; *id.* at 684 (Rehnquist, J., concurring); *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 670-671 & n.18 (1979). It follows that when this federal protection is removed, the Supremacy Clause no longer inhibits the operation of state-law time bars such as statutes of limitations and rules of adverse possession. See *Ewert* v. *Bluejacket*, 259 U.S. 129, 137 (1922); *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321, 334 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957).

b. The court of appeals did not disagree with the foregoing principles. But it sought to avoid the result they compel by reading the pertinent language in Section 5 of the Catawba Act as applying only to individual members of the Tribe, not to the Tribe itself. From this premise, the court concluded that in the particular circumstances of the Catawba Tribe, Congress had *not* lifted the federal restraint on alienation of the 144,000-acre tract or made the state statute of limitations applicable to the Tribe's claim to that land. See Pet. App. 19a-22a. We believe this construction of Section 5 is clearly wrong.

The second clause of the pertinent sentence of Section 5, quoted above (see page 9, *supra*), provides that after revocation of the Tribe's constitution, "all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, * * *." The court of appeals reasoned that this clause refers only to "Indians," not "Indian tribes," and that Congress therefore did not render special federal Indian statutes inapplicable to the Tribe. As petitioners argue, the court of appeals' construction "is not even grammatically possible" (Pet. 23; see also Pet. Reply Br. 3-5).

The operative word in the second clause for present purposes is not "Indians," as the court of appeals seemed to believe, but "them." The word "them" obviously refers to the phrase "the tribe and its members" in the first clause, which makes the "tribe and its members" ineligible for special services furnished by the federal government. The word "Indians" in the second clause,

upon which the court of appeals relied, appears only in an adjectival phrase that describes *which* "statutes of the United States" shall be inapplicable to the tribe and its members — namely, those statutes "that affect Indians because of their status as Indians." Thus, the second clause simply will not bear the construction given it by the court of appeals.[11] The Tribe's related contention (Br. in Opp. 14-15) that the third clause makes state law applicable only to individual members of the Catawba Tribe is equally untenable, because the third clause makes state laws applicable to "them," which again refers back to the "tribe and its members" mentioned in the first clause.

The court of appeals' interpretation also is contrary to the Interior Department's contemporaneous construction of Section 5 in an explanatory memorandum prepared for distribution to the members of the Tribe in 1960, prior to the time a majority gave their consent to the Act's provisions (C.A. App. 529). In that transmittal, the Solicitor's Office explained that "just as the 'tribe' no longer will be a legal entity which will be governed by Federal laws which refer to 'tribes,' so the individual members will no longer be subject to laws which apply only to Indians" (C.A. App. 531). Thus, the Interior Department construed Section 5 to lift federal protections and immunities from the Tribe itself as well as from individual members of the Tribe. Nor does the Tribe even now offer any plausible explanation for why Congress would have intended the anomalous result it urges in a statute the principal purposes of which were to transfer tribal property out of federal control (§ 3, 25 U.S.C. 933) and to *terminate* the Tribe's special status under federal law.

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[11]The court of appeals' reasoning is flawed even if the court were correct in focusing on the word "Indians" in the second clause, because, as the court of appeals conceded (Pet. App. 20a), the word "Indians" has been construed to include an Indian tribe as well as individual Indians. See *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 664-666 (1979). Furthermore, the first clause of Section 5 of the Catawba Act itself suggests that interpretation. That clause provides that "the tribe and its members shall not be entitled to any of the special services performed by the United States for *Indians* because of their status as *Indians*" (emphasis added). Obviously, by declaring the Tribe ineligible for federal services performed for "Indians," Congress meant to include services performed for Indian tribes.

c. In addition, this Court has identified the Catawba Act as one of "a series of termination statutes" (*Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 133 n.1 (1972)), and it was described by its sponsor as the "usual termination bill, with the usual provisions." *Hearings, supra* note 4, at 89. See also Pet. Reply Br. 6 nn. 12 & 13. Indeed, the Tribe disavows any argument that the Catawba Act is not a "termination" act. Br. in Opp. 17 n.15. It therefore is telling that the Tribe is claiming special protections under federal law and immunities from state law that are not available under any other termination act.

The Tribe suggests otherwise, arguing (Br. in Opp. 13 & n.9 (emphasis omitted)) that the same result would obtain under eight other termination acts because Congress provided in those acts that federal Indian statutes "shall no longer be applicable to the members of the tribe," but did not mention the tribe itself. What the Tribe fails to mention is that in six of these acts there is *other* language that explicitly terminated any trust relationship between the United States and the tribe concerned,[12] which necessarily terminated any "trust" relationship under the Trade and Intercourse Act; that the seventh act expressly provided for the withdrawal of federal "supervision" over tribal affairs,[13] which necessarily withdrew federal supervision of tribal land transactions under the Trade and Intercourse Act; and that the eighth act expressly preserved federal responsibility for the tribe, and thus has no bearing whatever on this case.[14] Moreover, as the

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[12]The language in 25 U.S.C. 564q, applicable to the Klamath Tribe, is typical. It provides for the Secretary to publish a proclamation "declaring that the Federal trust relationship to the affairs of the tribe and its members has terminated." See also 25 U.S.C. 703 (Western Oregon Indians); 25 U.S.C. 757(a) (Paiute Indians of Utah); 25 U.S.C. (1976 ed.) 803(a) (Wyandotte Tribe of Oklahoma); 25 U.S.C. (1976 ed.) 823(a) (Peoria Tribe of Oklahoma); 25 U.S.C. (1976 ed.) 848(a) (Ottawa Tribe of Oklahoma).

[13]See 25 U.S.C. (1970 ed.) 891, 895 and 896 (Menominee Tribe); *Menominee Tribe* v. *United States*, 391 U.S. 404, 411 (1968). The provision parallel to Section 5 of the Catawba Act was 25 U.S.C. (1970 ed.) 899.

[14]See 25 U.S.C. 677u (Ute Indians of Utah). This Court's decision in *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972), arose under that Act. The Tribe's reliance (Br. in Opp. 19-20 & n.18) on *Affiliated Ute Citizens* is therefore misplaced.

Tribe elsewhere concedes (Br. in Opp. 14-15), in all eight of these other termination acts, Congress expressly provided that state law shall apply to the tribe as well as its members, which alone was sufficient to trigger the application of the state statute of limitations.[15]

d. The court of appeals suggested (Pet. App. 17a-18a), however, that because the legislative history of the Catawba Act reflects an apparent understanding on the part of Congress that the United States' relationship with the Tribe arose exclusively out of the 1943 Memorandum of Understanding (see note 6, *supra*) and manifests an intent by Congress to abrogate that Memorandum, the Catawba Act should be given no broader effect that might bar the Tribe's claim. This suggestion is without merit.

Of course, the Congress that passed the Catawba Act in 1959 did not in this legislation, any more than in any statute, advert specifically to all the possible consequences when it enacted the general proposition that henceforward the Catawbas would be subject to state law like other citizens. And so it may be that Congress did not consider the potential effect of the Act on a claim regarding title to 144,000 acres. Indeed, that seems quite likely, since at the time — well before the decision of the First Circuit in *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370 (1975), and this Court's decision in *Oneida I* — such "ancient land claims" had considerably less force than they do now. But it is idle to speculate about what provision the Catawbas would have sought, what the Interior Department would have proposed, what South Carolina might have suggested, or what Congress would have enacted if they had focused on the precise issue presented here, just as it is idle to speculate in regard to any concrete set of circumstances which came into

[15]As the Tribe also concedes (Br. in Opp. 13, 14-15), in the relevant provision of the only two remaining tribal termination acts, Congress expressly provided that state law was to be applicable and federal Indian statutes were to be inapplicable to the tribe as well as its members. 25 U.S.C. 726 (Alabama and Coushatta Indians); 25 U.S.C. 980 (Ponca Tribe). Application of the state statute of limitations obviously was triggered by these acts as well.

being as a result of later factual or legal developments. This is especially so given the lack of ambiguity in the text that Congress did enact: *i.e.*, that any and all claims which the Catawbas may have should be subject to state law in the same manner as those of other citizens.

The fact is that the Catawba Act is not equivocal. The language of Section 5 of the Catawba Act is as sweeping as that in other termination acts, which uniformly reflect an intent to abolish *all* trust relationships between the federal government and the tribe concerned, whatever their source. Congress's focus in this case on the 1943 Memorandum of Understanding does not preclude the application of the all-embracing statutory language and congressional purpose to another alleged trust relationship (under the Trade and Intercourse Act) that was not specifically mentioned in the legislative history. See, *e.g.*, *Jefferson County Pharmaceutical Ass'n* v. *Abbott Laboratories*, 460 U.S. 150, 159 n.18 (1983); *United States* v. *Weber Aircraft Corp.*, No. 82-1616 (Mar. 20, 1984), slip op. 8, 9-11. Nor has the Tribe pointed to any indication in the legislative history that Congress affirmatively intended in 1959 to preserve federal restrictions against alienation and immunities from state law for the Tribe's interest in a tract of land that Congress knew had been conveyed by the Tribe to the State almost 120 years earlier and that had not been occupied by the Tribe since that time. We therefore conclude that the 10-year state statute of limitations began to run on the Tribe's claim as of July 1, 1962.[16]

[16]The Catawbas' claim was included on the list of pre-1966 damage claims published by the Secretary pursuant to the Indian Claims Limitation Act of 1982, Pub. L. No. 97-394, Tit. 1, § 2, 96 Stat. 1976, 28 U.S.C. 2415. See 48 Fed. Reg. 13920 (1983). As a result, the Tribe's claim, even insofar as it seeks trespass damages, is not barred by any generally applicable *federal* statute of limitations. See *Oneida II*, slip op. 14-16. But that listing does not exempt the Tribe's claim from the operation of the *state* statute of limitations that was made applicable by the Catawba Act. Nor does the listing of a claim for federal limitations purposes reflect a determination by the Department of the Interior that the claim has merit or is not otherwise barred.

We recognize that in 1977, the Solicitor of the Interior Department requested the Department of Justice to file an action on behalf of the

3. a. In addition to being clearly wrong on the central issue of law involving the application of the state statute of limitations, the court of appeals' decision is also of sufficient importance to warrant review by this Court. We have reached this conclusion only after consideration of a number of factors on each side of that question.

First, although the court of appeals' seeming disregard of the central purpose of termination acts to eliminate the special status of the particular tribe under federal law would be of concern if the court's view were given wide application, the actual holding below does not announce broad new legal principles. In *Oneida II,* the Court reaffirmed the general rule that state statutes of limitation do *not* ordinarily apply to a suit by a tribe to recover land that was conveyed in violation of federal restrictions. Slip op. 13 n.13. The narrow legal issue in this case is whether Congress rendered that general rule inapplicable in the particular circumstances of the Catawba Tribe. Contrary to petitioners' contention (Pet. 11-12), the decision below does not have broader implications for the interpretation of other termination acts. As we have explained (see pages 9-14, *supra*), the court of appeals did not disagree with the proposition that, where termination act language such as that in Section 5 of the Catawba Act applies, it has the effect of lifting federal restrictions on Indian land and subjecting Indian claims to state-law defenses. Rather, relying on what it believed to be the unique text and background of the Catawba Act, the court construed Section 5 as excluding the Tribe from its coverage. See Pet. App. 13a-16a, 17a-18a, 20a-23a. By contrast, the cases upon which petitioners rely (Pet. 13-19,

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Catawbas. See letter reproduced at Br. in Opp. App. 3a-7a. However, the Solicitor's letter did not address the question whether the Catawba Act made the Trade and Intercourse Act inapplicable — and the state statute of limitations applicable — to the Tribe and its land after 1962. That letter also did not consider whether such a suit should be brought by the United States on the Tribe's behalf notwithstanding: (i) Congress's declaration in Section 5 of the Catawba Act that the Tribe is no longer entitled to "special services" performed by the United States for Indians, and (ii) Congress's termination of any relationship with the Tribe and the lifting of federal restrictions from its land. Cf. *United States* v. *Waller,* 243 U.S. 452, 463-464 (1917).

25-26) addressed the effect of treaties and statutes that, unlike the Fourth Circuit's view of the Catawba Act, *did* lift federal restrictions on alienation of Indian land or terminate all aspects of the trust relationship between the United States and the Indians concerned.

Second, the court of appeals' decision is interlocutory in nature. Although the First Circuit held in *Joint Tribal Council of the Passamaquoddy Tride* v. *Morton,* 528 F.2d 370, 376-379 (1975), that the Trade and Intercourse Act applied even where the tribe concerned was not formally recognized by the federal government, the courts below have not yet addressed that issue. Nor have the courts below considered whether the Tribe should be deemed to have abandoned the land or its claim thereto (see U.S. Br. in *Oneida II,* at 38-39 n.35); whether a federal rule of laches might bar this suit (*Oneida II,* slip op. 16-17; *id.* at 9-17 (Stevens, J., dissenting)); or whether equitable principles might limit the relief available (*Oneida II,* slip op. 26 n.27; U.S. Br. in *Oneida II,* at 33-40).[17]

Third, if the Court were to hold that the state statute of limitations is applicable, that disposition might not immediately resolve the underlying controversy concerning the Tribe's interest in the land. Petitioners seem to have conceded below (C.A. Br. 28-30) that although in their view the Tribe's suit is barred by the

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[17]We do not agree with Judge Murnaghan's suggestion (Pet. App. 30a-34a) that a court might hold the United States liable to the Tribe in money damages. The Tribe could have sued the United States under the Indian Claims Commission Act for failing to protect its interests at the time of (or after) the 1840 transaction (see *Oneida II,* slip op. 22 n.25), but it failed to do so. Any present claim for money damages would be subject to the six-year statute of limitations (28 U.S.C. 2501), and there may be other limitations on such a suit. In addition, there is no indication that Congress ever formally recognized the title the Tribe asserts (see page 2, *supra*), and it was South Carolina, not the United States, that acquired the Tribe's land in 1840 and then disposed of it. By contrast, in *Yankton Sioux Tribe* v. *United States,* 272 U.S. 351 (1926), upon which Judge Murnaghan relied (Pet. App. 30a-32a), the United States conveyed the land to third parties, the Tribe had a federally recognized interest in that land, and Congress passed a special jurisdictional act authorizing the suit.

10-year state statute of limitations,[18] this does not necessarily mean that fully unencumbered title is vested in the defendant landowners. That issue turns on the operation of the South Carolina law of adverse possession. Compare *Block* v. *North Dakota*, 461 U.S. 273, 291-292 & n.28 (1983). It appears that under South Carolina law, a person cannot tack onto his own period of adverse possession the period of possession by a prior adverse occupant from whom he took by conveyance. See *Adams* v. *Adams*, 220 S.C. 131, 66 S.E.2d 809 (1951); *Haithcock* v. *Haithcock*, 123 S.C. 61, 115 S.E. 727 (1923), 7 R. Powell, *The Law of Real Property* ¶ 1014[2], at 91-63 (1984). Presumably, some owners of homes and other property in the claims area have not personally been in possession for the 10 years necessary to obtain title by adverse possession.

b. Notwithstanding the foregoing considerations, several factors, especially when considered in combination, persuade us that the Court should grant certiorari.

First, the Tribe seeks possession of more than 140,000 acres of land, and it has sued the named petitioners as representatives of a class allegedly composed of 27,000 defendants who claim an interest in that land. Thus, although the decision below affects only the particular claim of the Catawba Tribe, it appears to be of considerable practical and immediate importance. Compare *United States* v. *Dann*, No. 83-1476 (Feb. 20, 1985).

Second, the degree to which the court of appeals erred is an appropriate consideration in determining whether a particular decision warrants review. Here, the court of appeals' holding that the state statute of limitations ~~issue~~ does not apply is both clearly

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[18]Because the court of appeals held that state law is inapplicable to the Tribe's claim, it had no occasion to consider whether this suit would be barred as to some or all defendants if the South Carolina statute of limitations does apply. The district court, however, held that the suit is barred as to all defendants under the state statute of limitations (Pet. App. 49a). That would appear to be a reasonable interpretation of S.C. Code Ann. §§ 15-3-340 and 15-3-350 (Law. Co-op. 1977); although we do not here express a final view on that question of state law. If the Court were to grant certiorari and hold that this suit is subject to state law defenses, it might choose to remand the case to the court of appeals to decide this question of state law.

erroneous and flatly inconsistent with the congressional judgment that the Catawbas should no longer be entitled to a special status under federal law.

Third, we do not believe that the interlocutory posture of the case should lead the Court to deny review. The purpose of a statute of limitations is to prevent the assertion of claims after passage of a suitable period of time and thereby to protect settled expectations and to prevent the litigation of stale claims. If the Court were to grant certiorari and reverse on the issue of the application of the state statute of limitations, the result under the district court's interpretation of South Carolina law would be the dismissal of the suit as against all 27,000 potential defendants. See no[18], *supra*. This obviously would substantially further the policies of the statute of limitations. In analogous circumstances in *Nevada* v. *United States*, No. 81-2245 (June 24, 1983), the Court granted certiorari to review an interlocutory appellate decision addressing the application of res judicata, which likewise is intended to protect the interest in repose and judicial economy that is at its "zenith in cases concerning real property" (slip op. 17-18 n.10).

Fourth, although the equitable considerations that were discussed by the dissent in *Oneida II* but not resolved by the majority have not yet been presented in this case, those considerations weigh in favor of review here to prevent acknowledged difficulties and unfairness to numerous defendants. Unlike the land claim involved in *Oneida II*, where such equitable considerations might be utilized to temper what might seem (at least insofar as innocent private landowners are concerned) like a harsh result occasioned by application of settled legal principles, this case presents the circumstance in which the equities of innocent landowners would be protected by the straightforward application of such legal principles to overturn an altogether erroneous decision below. Although a holding by this Court that the state statute of limitations applies might not resolve the underlying question of title to certain tracts as to which the period of adverse possession has not run because of South Carolina's no-tacking rule, it presumably would, by virtue of affirming the application

of state law, substantially settle much of the uncertainty occasioned by this suit and would conclusively determine the title question as regards at least substantial portions of the land.

Fifth, unlike in *Oneida II*, where the United States had entered into treaties with the Oneidas that are still in effect (slip op. 2-3), in this case there is no continuing federal relationship with the Tribe. Moreover, although the Court observed in *Oneida II* that Congress might well intervene in the controversy over the New York lands should the occasion arise (slip op. 25), here, an Act already passed by Congress — the Catawba Act — effectively disposes of this lawsuit under the district court's construction of South Carolina law. The Court therefore need not defer to the possibility of a solution to the controversy by Congress at some point in the future.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

JACQUES B. GELIN
ARTHUR E. GOWRAN
Attorneys

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APPENDIX

STATUTORY AND TREATY PROVISIONS INVOLVED

Section 5 of the Catawba Indian Tribe Division of Assets Act, 25 U.S.C. 935, provides:

> The constitution of the tribe adopted pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in this subchapter, however, shall affect the status of such persons as citizens of the United States.

2. The Treaty of Augusta of 1763 between Great Britain and various Indian Tribes provided in pertinent part (Pet. App. 7a n.2; C.A. App. 136-137):

> And We the Catawba Head Men and Warriors in Confirmation of an Agreement heretofore entered into with the White People declare that we will remain satisfied with the Tract of Land of Fifteen Miles square a Survey of which by our consent and at our request has been already begun and the respective Governors and Superintendent on their Parts promise and engage that the aforesaid survey shall be [completed] and that the Catawbas shall not in any respect be molested by any of the King's subjects within the said Lines but shall be indulged in the usual Manner of hunting Elsewhere.